

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

REQUEST FOR RECONSIDERATION OF
STATEMENT OF DECISION ADOPTED
ON MARCH 30, 2005,

ON RECONSIDERATION OF
Statutes 1980, Chapter 1143, Claim No.
3929, Directed by Statutes 2004, Chapter
227, Sections 109-110 (Sen. Bill No. 1102),
Effective August 16, 2004;

Filed on May 6, 2005 by the
Southern California Association of
Governments, Sacramento Area Council of
Governments, Association of Bay Area
Governments, California Association of
Councils of Governments, and San Diego
Association of Governments, Appellants

Case No.: 04-R-01 (04-RL-3929-05)

***Regional Housing Needs Determination:
Councils of Governments***

ADOPTION OF STAFF ANALYSIS AND
NO ACTION TAKEN PURSUANT TO
CALIFORNIA CODE OF REGULATIONS,
TITLE 2, SECTION 1188.4

(Adopted on June 10, 2005)

DECISION

On June 10, 2005, the Commission on State Mandates adopted the attached amended staff analysis on the above-named matter by a vote of 3-0, with 1 abstention. The amended staff analysis recommended that the Commission take no action on the request for reconsideration because it does not have jurisdiction.

Dated: June 14, 2005

PAULA HIGASHI, Executive Director

Attachment: Item 2, Amended Staff Analysis – June 9, 2005

ITEM 2

AMENDED STAFF ANALYSIS – JUNE 9, 2005

REQUEST FOR RECONSIDERATION of the Commission's Statement of Decision Adopted March 30, 2005

Government Code Sections 65302, Subdivision (c), and Sections 65580 – 65589;
Statutes 1980, Chapter 1143 (Assem. Bill No. 2853)
Board of Control Decision No. 3929

Reconsideration of *Regional Housing Needs Determination:*
Councils of Governments

Directed by Statutes 2004, Chapter 227,
Sections 109 and 110 (Sen. Bill No. 1102 ("SB 1102"))
(04-RL-3929-05)

Southern California Association of Governments, Sacramento Area Council of Governments,
Association of Bay Area Governments, California Association of Councils of Governments, and
San Diego Association of Governments, Requestors¹

EXECUTIVE SUMMARY

This revised staff analysis amends and supersedes the staff analysis earlier provided on the request for reconsideration made, pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations, by councils of governments on the Commission's decision adopted on March 30, 2005. The added analysis is underscored.

This is a request for reconsideration made, pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations, by councils of governments on the Commission's decision adopted on March 30, 2005.

Within a limited statutory timeframe, the Commission has the discretion to reconsider a prior final decision. Any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law. The petition must be filed within 30 days after the statement of decision is issued.

¹ On page 2 of the request for reconsideration, it states that "The Southern California Association of Governments ("SCAG") hereby requests that the Commission reconsider its Statement of Decision . . ." However, the request for reconsideration was signed by the attorneys for SCAG "and on behalf of Sacramento Area Council of Governments, Association of Bay Area Governments, California Association of Councils of Governments, and San Diego Association of Governments." Therefore, the request for reconsideration has been deemed filed by all the affected councils of governments listed under the signature line in the request.

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted. Five affirmative votes are required to grant the request for reconsideration and schedule the matter for a hearing on the merits. If no action is taken on the request, or the request to grant reconsideration does not receive five affirmative votes, the petition is deemed denied.

The request for reconsideration is not a prerequisite for seeking judicial review of the Commission's decision.²

Conclusion

Based on the evidence in the record, staff concludes that the Commission does not have jurisdiction to consider this request for reconsideration because (1) the petition was not timely filed; and (2) the time for any action by the Commission on the reconsideration has lapsed and the request is deemed denied by operation of law.

If, however, evidence becomes available before the hearing to support a finding that this request for reconsideration is timely filed, and if the Commission disagrees with staff's conclusion that the time for action on the reconsideration has lapsed, the Commission has the following options:

Option 1: The Commission can deny the request, finding that the councils of governments have raised no issues that merit reconsideration.

Option 2: With five affirmative votes, the Commission can approve the request, all or in part, finding that reconsideration is appropriate to determine if any error of law is present.

Option 3: The Commission can take no action, which has the legal effect of denying the request.

If the Commission decides to proceed, staff recommends that the Commission adopt Option 1 and deny the reconsideration on the ground that the councils of governments have not raised any new arguments or facts that warrant reconsideration.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and take no action on the request for reconsideration for lack of jurisdiction.

² "Failure to seek commission reconsideration of a prior final decision shall not affect a claimant's or state agency's right to seek judicial review pursuant to Government Code section 17559." California Code of Regulations, title 2, section 1188.4, subdivision (i).

STAFF ANALYSIS

Chronology

03/30/05	Commission adopts statement of decision
04/05/05	Statement of decision issued by mail and posted to Commission's website
05/05/05	Requestors attempt to e-mail request for reconsideration, but delivery is not successful
05/06/05	Request for reconsideration received
06/01/05	Staff analysis issued
06/09/05	Amended staff analysis issued

Background

Government Code section 17559, subdivision (a), as stated below, grants the Commission, within a limited statutory timeframe, the discretion to reconsider a prior final decision:

The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

Any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.³ The petition must be filed within 30 days after the statement of decision is delivered or mailed to the claimant.⁴

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.⁵ Five affirmative votes are required to grant the request for reconsideration and schedule the matter for a hearing on the merits.⁶

If the Commission grants the request for reconsideration, a subsequent hearing on the merits is conducted to determine if the prior final decision is contrary to law and to correct an error of law.⁷ Five affirmative votes are required to change a prior final decision.⁸

³ California Code of Regulations, title 2, section 1188.4, subdivision (b).

⁴ Government Code section 17559, subdivision (a); California Code of Regulations, title 2, section 1188.4, subdivision (a).

⁵ California Code of Regulations, title 2, section 1188.4, subdivision (f).

⁶ *Ibid.*

⁷ California Code of Regulations, title 2, section 1188.4, subdivision (g).

⁸ California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

If no action is taken by the Commission on the request for reconsideration within the time allowed for ordering reconsideration, the petition for reconsideration “shall be deemed denied.”⁹

The request for reconsideration is not a prerequisite for seeking judicial review of the Commission’s decision.¹⁰

For purposes of this hearing, the issues before the Commission are whether the Commission has jurisdiction to consider the request for reconsideration, and, if there is jurisdiction, whether the Commission should exercise its discretion to grant the request for reconsideration.

The Commission’s March 30, 2005 Decision

On March 30, 2005, the Commission re-heard and decided the test claim on *Regional Housing Needs Determination: Councils of Governments*, as directed by SB 1102

(Stats. 2004, ch. 227). SB 1102 required the Commission to reconsider the test claim, which was approved by the Board of Control in 1981, in light of changes in state and federal law, “including the existence of fee authority pursuant to Section 65584.1 of the Government Code.”

The test claim statute, Government Code section 65584, as added by Statutes 1980, chapter 1143, requires each council of government to determine the existing and projected housing needs for its region, and each locality’s share of the housing need.¹¹ After the council of government determines the housing needs for each locality in its region, a county or city may revise the definition of its share based on available data. The council of government is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.¹²

The Commission concluded that the Board of Control’s decision was legally incorrect under current law based on the following grounds:

- The type of “costs” incurred by councils of governments are not the type of costs that are reimbursable under article XIII B, section 6 of the California Constitution since councils of governments are not subject to the tax and spend limitations of articles XIII A and XIII B. Thus, councils of governments are not eligible claimants for purposes of mandate reimbursement.
- Based on the plain language of Government Code section 65584.1, councils of governments possess fee authority sufficient to pay for the mandated program. Thus, pursuant to Government Code section 17556, subdivision (d), there are no costs mandated by the state.

Request for Reconsideration

The request for reconsideration alleges errors of law with respect to both conclusions in the statement of decision.

⁹ California Code of Regulations, title 2, section 1188.4, subdivision (a).

¹⁰ “Failure to seek commission reconsideration of a prior final decision shall not affect a claimant’s or state agency’s right to seek judicial review pursuant to Government Code section 17559.” California Code of Regulations, title 2, section 1188.4, subdivision (i).

¹¹ Former Government Code section 65584, subdivision (a).

¹² Former Government Code section 65584, subdivision (c).

Councils of governments as eligible claimants under article XIII B, section 6

The requestors allege that the Commission erred in finding that councils of governments are not eligible claimants under article XIII B, section 6 and Government Code section 17500 et seq. In this regard, the requestors argue that:

The Commission's focus on the definition of "special districts" [in Government Code section 17520] is completely misplaced since the COGs have not claimed they qualify as special districts for reimbursement under SB 90. Rather, the COGs, as joint power authorities consisting of cities and counties, qualify for reimbursement as "local agencies" as defined by Section 17518, which includes joint powers "authorities."¹³

The requestors further argue that:

The fact that cities, counties and special districts have the power to tax, does not mean the "authorities" must also have this same power. A less strained and more reasonable interpretation is that the Legislature intended to include all forms of cities, counties, and special districts including "authorities" and "political subdivisions" in its definition of "local agencies." This interpretation is supported by the plain language of the statute: " 'local agency' means any city, county, special district, authority, or political subdivision of the state." There are no specified characteristics or criteria listed or implied which give rise to an interpretation that each type of entity listed must have the power to tax in common."¹⁴

Fee authority pursuant to Government Code section 65584.1

The requestors allege that the Commission erred in finding that councils of governments possess fee authority sufficient to pay for the mandated program pursuant to Government Code section 17556, subdivision (d). In this respect, the requestors argue that:

- The Legislature, when it enacted the fee authority statute (Gov. Code, § 65584.1), violated the Contract Clause of the California Constitution since the statute impairs the existing contracts between the councils of governments and its members. The existing agreements do not allow the councils of governments to charge a fee.¹⁵
- Even if the members of the councils of governments approved the fee authority, "it would simply be a voluntary agreement by the member agencies to pay for the cost of the regional housing needs assessment [RHNA] with local proceeds of taxes. Thus, section 65584.1 places the burden of paying for the RHNA, a state-mandated program, directly on the COGs themselves by imposing the costs on their members." The requestors argue that this result violates the purpose of article XIII B, section 6.¹⁶
- The Commission's reliance on *Connell v. Superior Court* (1997) 59 Cal.App.4th 382 is misplaced because the fee authorized by Government Code section 65584.1 is entirely different than the "legitimate passing through of costs to end users" in *Connell*. Government Code section 65584.1 does not provide "adequate" authority to

¹³ Request, pages 5-6. (Exhibit A.)

¹⁴ Request, page 5.

¹⁵ Request, pages 6-7.

¹⁶ Request, pages 7-9.

levy fees to offset the cost of conducting the program since the developers that pay the fees do not receive any specific service from the cities and counties.¹⁷

The request for reconsideration also alleges that the Commission failed to “adequately consider the arguments made by SCAG and other Councils of Governments . . . during the prior proceeding.”¹⁸

Discussion

Issue 1: Does the Commission have jurisdiction to consider the request for reconsideration?

Administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.¹⁹ Since the Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.), its powers are limited to those authorized by statute.

Government Code section 17559, subdivision (a), gives the Commission jurisdiction to reconsider or amend its decisions only if a petition for reconsideration is filed within 30 days after the statement of decision is issued. The statute expressly provides “The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant.”

Under the Commission’s regulations, “filing date” and the “time” for filing is defined as follows:

“Filing date” means the date of delivery to the commission’s office during normal business hours. For purposes of meeting the filing deadline required by statute, the filing is timely if:

- (1) the filing was mailed by certified or express mail or a common carrier promising overnight delivery, and
- (2) the time for its filing had not expired on the date of its mailing by certified or express mail as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier’s receipt.²⁰

Government Code section 11020 provides that the “normal business hours” for state agencies, such as the Commission, is from 8 a.m. until 5 p.m. each day from Monday to Friday.

Thus, under the Commission’s regulations, even if the Commission receives a document, including a request for reconsideration, on the day after the deadline for filing, the document can still be considered timely if the request was delivered to an overnight common carrier *before* the time for filing has expired; that is, before 5 p.m. on the deadline date.

¹⁷ Request, pages 9-11.

¹⁸ Request, page 2.

¹⁹ *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

²⁰ California Code of Regulations, title 2, section 1181.1, subdivision (g).

In the present case, the statement of decision was issued by electronic mail to all interested parties and posted to the Commission's website on April 5, 2005. In addition, on April 5, 2005, at 3:54 p.m., a notice of posting the statement of decision on the Commission's website was e-mailed to all parties on the mailing list.²¹ Thus, the parties received actual notice of the adopted statement of decision on April 5, 2005.

When computing time under the Commission's regulations, the day of the act or event from which the designated period of time begins to run shall not be included and the last day of the period shall be included.²² Thus, for purposes of this claim, the 30-day time period for filing a request for reconsideration began to run on April 6, 2005, with the 30-day time period expiring on May 5, 2005. Therefore, the Commission retains jurisdiction over this claim for purposes of reconsideration if:

- the request is actually received (via hand delivery, mail, or e-mail)²³ by the Commission office by May 5, 2005, at 5 p.m.; or
- the request is delivered to a common carrier by May 5, 2005, at 5 p.m., for overnight delivery to the Commission office by May 6, 2005.

The evidence, however, does not support the finding of jurisdiction. On May 5, 2005, at 5:25 p.m., after normal business hours, the attorney for SCAG e-mailed a Commission attorney and attempted to attach to the e-mail the request for reconsideration. In the e-mail, the SCAG attorney states that "We have also Fed Exed a hard copy to you which you should receive tomorrow."²⁴

Subsequently, on May 5, 2005, at 5:54 p.m., the attorney for SCAG sent another e-mail stating the following: "I tried to send you our scanned request for reconsideration but my email bounced back because your mailbox is full. Please let me know when you would like me to try to send it again. You will still receive the hard copy via Fed Ex."²⁵

On May 6, 2005, the Commission received the request for reconsideration via Fed Ex overnight delivery. The label on the Fed Ex envelope, however, does not indicate the time on May 5, 2005, the request for reconsideration was actually delivered to Fed Ex for overnight delivery to the Commission.²⁶ If the councils of governments delivered the document to Fed Ex *after 5 p.m.* on May 5, 2005, the Commission does not have jurisdiction to hear this request for reconsideration.

Accordingly, based on the evidence in the record, staff recommends that the Commission deny this request for reconsideration on the ground that the Commission lacks jurisdiction because the filing was untimely.

²¹ See letter transmitting the statement of decision, dated April 5, 2005 (attachment to Exhibit A), and the e-mail notice, dated April 5, 2005, of posting the statement of decision on the Commission's website. (Exhibit C.)

²² California Code of Regulations, title 2, section 1183.01, subdivision (a)(1).

²³ The Commission's regulations allow for the filing of documents by e-mail with prior consent of the parties or at the direction of the Commission.²³ The notices issued for purposes of this reconsideration allowed parties to file documents by e-mail to the Commission's main e-mail address, csminfo@csm.ca.gov.

²⁴ Exhibit D.

²⁵ Exhibit D.

²⁶ Exhibit E.

Even if the filing was timely, the time for the Commission to act on the reconsideration has expired and the Commission is without jurisdiction to proceed.

Government Code section 17559, subdivision (a), limits the Commission's power to reconsider a prior final decision beyond a specified time:

The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(Emphasis added.)

Commission regulation similarly provides that if no action is taken by the Commission on the request for reconsideration within the time allowed for ordering reconsideration, the petition for reconsideration "shall be deemed denied."²⁷

Notice of the Commission's decision on the reconsideration was mailed and posted to the Commission web site on April 5, 2005. The request for reconsideration was received on May 6, 2005. The time for the Commission to act on the reconsideration, as specified in the statute, expired on June 6, 2005. By operation of law, the reconsideration is deemed denied.

Staff concludes that the Commission does not have jurisdiction to consider this request for reconsideration. The time for any action by the Commission on the reconsideration has lapsed. The reconsideration is deemed denied by operation of law.

Accordingly, staff recommends that the Commission take no action with respect to this reconsideration for lack of jurisdiction because the request is deemed denied by operation of law.

Issue 2: Should the Commission exercise its discretion and grant the request for reconsideration?

If, however, evidence becomes available to support a finding that the Commission has jurisdiction to consider this request for reconsideration, and if the Commission disagrees with staff's conclusion that the time for action on the reconsideration has lapsed, the sole issue is whether the Commission should exercise its discretion to grant the request for reconsideration.

Government Code section 17559, subdivision (a), expressly gives the Commission the discretion to reconsider or amend its decisions, in full or in part, on petition by any party within the statutory 30-day time period. The statute states in relevant part: "The commission *may order* a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party." (Emphasis added.)

There are no stated statutory grounds upon which a petition for reconsideration must be based, thus any reason(s) may be offered. Here, however, the councils of governments are seeking reconsideration for an alleged error of law pursuant to section 1188.4 of the Commission's

²⁷ California Code of Regulations, title 2, section 1188.4, subdivision (a).

regulations. (Cal. Code Regs., tit. 2, § 1188.4, subd. (b).) Section 1188.4, subdivision (f), requires five affirmative votes to grant reconsideration and schedule the matter for a hearing on the merits. If the Commission takes no action, or the request to grant reconsideration does not receive five affirmative votes, the petition is deemed denied.²⁸

In determining whether to exercise discretion to grant a request for reconsideration, the Commission properly considers the request in the context of the proceeding in which it arises, the reasons given in support of the request for reconsideration, and the Commission's own decision-making role. In reaching the decision, the Commission is guided by the Legislature's direction that "the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution."²⁹

The purpose of granting reconsideration must be viewed in the context of the Commission's decision-making role. The Commission has exclusive jurisdiction to determine the existence of a reimbursable state mandate,³⁰ and has power to do those things necessary to carry out its statutory duties.³¹ The law presumes that the Commission has performed its duties correctly.³² Finality of decisions is favored, and reconsideration should not be viewed as a means to decide again what has already been decided.³³

In this case, the request for reconsideration raises the same arguments made by the councils of governments, through written and oral testimony, at the Commission hearing in March. With the exception of one abstention, the Commission unanimously disagreed with the arguments raised by the councils of governments after a full hearing on the merits.³⁴ The councils of governments have not raised any new matter or argument that warrants reconsideration.

In this regard, the courts have recognized that:

The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)³⁵

Accordingly, staff recommends denial of reconsideration on the ground that the councils of governments have not raised any new arguments or facts that warrant reconsideration.

CONCLUSION

Based on the evidence in the record, staff concludes that the Commission does not have jurisdiction to consider this request for reconsideration because (1) the petition was not timely

²⁸ Government Code section 17559, subdivision (a); California Code of Regulations, title 2, section 1188.4, subdivisions (a) and (f).

²⁹ Government Code section 17500.

³⁰ Government Code sections 17551, 17552.

³¹ Government Code section 17527, subdivision (h).

³² Evidence Code section 664; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 820-821.

³³ *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.

³⁴ See statement of decision attached to petition for reconsideration (Exhibit A), and the transcript for the item at the Commission's March 30, 2005 hearing (Exhibit B).

³⁵ *Sierra Club, supra*, 21 Cal.4th at page 501.

filed; and (2) the time for any action by the Commission on the reconsideration has lapsed and the request is deemed denied by operation of law.

If, however, evidence becomes available before the hearing to support a finding that the Commission has jurisdiction to consider this request for reconsideration, and if the Commission disagrees with staff's conclusion that the time for action on the reconsideration has lapsed, the Commission has the following options:

Option 1: The Commission can deny the request, finding that the councils of governments have raised no issues that merit reconsideration.

Option 2: With five affirmative votes, the Commission can approve the request, all or in part, finding that reconsideration is appropriate to determine if any error of law is present.

Option 3: The Commission can take no action, which has the legal effect of denying the request.

If the Commission decides to proceed, staff recommends that the Commission adopt Option 1 and deny the reconsideration on the ground that the councils of governments have not raised any new arguments or facts that warrant reconsideration.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and take no action on the request for reconsideration for lack of jurisdiction.